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In The Supreme Court of the United States

THE REPUBLIC OF CONGO,
CMS NOMECO CONGO INC., THE NUEVO
CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

vs.

AF-CAP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF CHEVRONTEXACO CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST AND IDENTITY OF *AMICUS CURIAE*[1]

ChevronTexaco Corporation ("ChevronTexaco") as *amicus curiae* files this brief because it has a keen interest in the issues that petitioners have raised and seeks to bring to the Court's attention relevant matter not already set forth in the petition for writ of certiorari. This case involves an attempt in Texas by respondent Af-Cap, Inc. ("Af-Cap"), a foreign company, to execute on a judgment against petitioner the Republic of Congo (the "Congo") by garnishing the obligations of several domestic oil companies to furnish a royalty share of oil to the Congo. Based on that same judgment, Af-Cap is also pursuing similar enforcement of judgment efforts in other United States courts to garnish the obligations of other companies to furnish oil royalties to the Congo. Af-Cap's efforts include actions in the United States District Court for the Northern District of California in which Af-Cap seeks to garnish similar obligations of subsidiaries or affiliates of ChevronTexaco. Thus, ChevronTexaco has an immediate interest in the issues raised in the petition for writ of certiorari.

Apart from its immediate interest in the California action, ChevronTexaco also has a substantial general interest in the resolution of the important Foreign Sovereign Immunities Act (FSIA) question raised in the petition. Subsidiaries or affiliates of ChevronTexaco are active in

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[1] All parties have consented in writing to the filing of this brief. The consent letters are submitted with *amicus curiae*'s proof of service.

Pursuant to Rule 37.6, *amicus curiae* states that no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus curiae* authored the brief.

more than 180 nations and have entered into a wide array of ventures with foreign sovereigns to explore or develop the oil, gas or other mineral resources within those nations. They have invested more than $5 billion in African projects alone. They likewise are involved in ventures in the Pacific Rim, Eurasia, the Middle East, Latin America, the Carribean, Europe and North America. Through these ventures, subsidiaries or affiliates ChevronTexaco owe substantial oil, gas or other royalties to many sovereign nations that have sizeable unrelated debts. Much of this unrelated debt is in default and subject to acquisition for a small fraction of the face value and accumulated interest.

The Fifth Circuit's interpretation of the FSIA below threatens to embroil ChevronTexaco and numerous other American companies involved in overseas ventures in protracted and costly efforts by creditors holding sovereign debt to garnish the obligations of American companies to sovereign nations. This result will substantially and adversely impact American companies in their efforts to develop foreign mineral resources and will subject them to burdensome and intrusive litigation to collect debts to which they are strangers. For this reason as well, ChevronTexaco, and all other companies involved in ventures with foreign nations, have a profound interest in the proper resolution of the FSIA question raised in the petition.

ChevronTexaco does not in this brief repeat petitioners' well-reasoned analysis of the Fifth Circuit decision and the problems created thereby. It submits this *amicus brief* solely to provide the court with some additional context that further illustrates the exceptional importance of the question presented.

THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

A. The Fifth Circuit's Holding Will Disadvantage American Companies In Competing For Overseas Development Projects, Will Burden Those Companies With Costly and Intrusive Garnishment Litigation And Will Impair Foreign Relations

Until 1952, the United States generally granted foreign sovereigns absolute immunity from the jurisdiction of American courts, including complete immunity from execution. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Currently, the FSIA permits execution on a foreign sovereign's property only if, among other things, the sovereign's property is "in the United States" *and* is "used for commercial activity in the United States." *See Connecticut Bank Of Commerce v. The Republic Of Congo*, 309 F.3d 240, 247 (5th Cir. 2002); App. 53a. The Fifth Circuit below held that with respect to an intangible debt owed to a sovereign, the "in the United States" prong may be satisfied whenever *the debtor* – as distinct from the development activity giving rise to the debt – is located in the United States. This holding places American companies at a substantial disadvantage in competing with foreign companies in the quest for overseas oil, gas and mineral investment opportunities that are vital to the economy of our country.

The Fifth Circuit's holding exposes foreign sovereigns to the risk that any obligation that any American company owes to the sovereign – even if generated by development efforts that occur entirely within the sovereign's territorial jurisdiction – could be attached in the United States to

satisfy unrelated debts to foreign creditors, like Af-Cap. Given the size of their debts, many foreign nations will have a powerful incentive to limit or curtail their dealings with American companies in ways that will harm the competitiveness of American companies and impair the foreign relations of the United States.

After all, for the Congo and many other developing countries, oil or other mineral resources are the primary source of revenue in otherwise challenged economies. *E.g.*, Background Note: Angola, U.S. Dep't of State, Bureau of African Affairs, http://www.state.gov/r/pa/ei/bgn/6619.htm; Background Note: Republic of Congo, U.S. Dep't of State, Bureau of African Affairs, http://www.state.gov/r/pa/ei/bgn/2825.htm. Sound management of oil and mineral revenues is essential "to ensure that these revenues are successfully converted into social capital and lead to broader-based overall economic development and poverty reduction for the country as a whole." Oil & Gas Sector Issues and Policy: Social & Economic Impact, The World Bank Group, http:www.worldbank.org/ogmc/wbogpolicysocioeconomic.

For developing countries like the Congo that have substantial debts, a rule that permitted foreign creditors to use American courts to seize oil or mineral royalties owed by American companies could drain revenue that is critical to meet these nations' current needs and could undermine their efforts to work with the International Monetary Fund and World Bank for a long term debt solution. Worse still, this siphoning would not occur through a thoughtfully planned process but rather through haphazard litigation brought by any creditor that is able to convert a past debt into a judgment, often by default.

Faced with these risks, developing countries likely will seek to curtail or limit their dealings with companies located in the United States in favor of either state-run enterprises or companies from countries who afford broader immunity from execution. In either scenario, American companies will lose – not because they cannot deliver capital and technical expertise on terms that match or beat their competitors but instead because of the Fifth Circuit's interpretation below.

In addition to creating an incentive for foreign nations to discriminate against American companies, the lower court's holding also injects unnecessary friction into the dealings between foreign nations and American companies. Although the holding below enables creditors of foreign sovereigns to garnish royalty obligations owed by American companies, the opinion does not protect the American garnishees from being forced to pay those royalty obligations twice – once to the garnishor and again to the sovereign. The opinion permits American courts to exercise jurisdiction over the garnishor's claims, but there is no guarantee that these garnishments will be recognized by the sovereign or in any foreign tribunal that has jurisdiction over claims between the garnishee and the sovereign. Nor is it clear whether or under what circumstances an American court would have jurisdiction over the latter claims. Thus, the opinion creates an unacceptable risk that American companies will be forced involuntarily to pay debts to which they are a complete stranger merely because they entered into unrelated development agreements with the debtor sovereign.

Moreover, the garnishment litigation permitted under the holding below would be burdensome and intrusive for the American garnishees. Under the correct FSIA rule,

efforts to garnish obligations that arose from activities occurring within a foreign sovereign's territorial jurisdiction would be barred at their inception because the FSIA's requirement that the garnished property be "in the United States" should be interpreted in a manner comparable to the situs definitions in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985) and *F. & H.R. Faman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co.*, 882 F.2d 281, 286-87 (7th Cir. 1989).

But under the Fifth Circuit's rule, even obligations arising from activities occurring entirely overseas would satisfy the FSIA's situs requirement as long as the obligor is an American company. For American garnishees, this would effectively write the "in the United States" requirement out of the FSIA and would permit every garnishment action against an American company to proceed to an inquiry solely as to whether the foreign sovereign used its royalty right "for a commercial purpose in the United States."

Litigation to determine the "situs" and "used for" prongs of the sovereign immunity exception under FSIA typically entails costly and intrusive discovery into the sensitive business affairs of the garnishee and its relationship with the sovereign. Even when the sovereign is directly involved in the enforcement of judgment proceedings, courts will often require that the garnishor first pursue discovery from the garnishee. The garnishor typically will demand, among other things, the production of all documents concerning the historical, current and prospective (i) obligations of the garnishee to the sovereign; (ii) agreements and transactions between the garnishee and the sovereign; (iii) exploration and production

of oil and other hydrocarbons; (iv) oil field operations and reserves; (v) lifting and marketing of oil; (vi) investment decisions and communications with other investors; (vii) internal and external negotiations concerning new projects and modifications to existing agreements; (viii) project financing and capital calls; (ix) bank and accounting records; (x) tax returns, management and internal operations of garnishee; (xi) discharge of any obligations to the sovereign including the bank accounts used by the sovereign; (xii) use of any oil proceeds by the sovereign; (xiii) information about the corporate structure and relationships among affiliated garnishees; (xiv) information about any contacts that might subject the garnishee to jurisdiction in the United States or result in alter ego liability of an upstream domestic affiliate of the garnishee, and (xv) deposition testimony from any and all witnesses that may be able to shed light on any of these issues.

In the Northern California action alone, which included three separate proceedings, the ChevronTexaco garnishees incurred almost 3,000 attorney hours over three years at substantial expense in responding to Af-Cap's garnishment efforts. The burden is staggering when one considers that the ChevronTexaco garnishees were strangers to the debt on which Af-Cap sought to execute. This burden on strangers to the underlying debt is even more intolerable when one further considers the intrusion into the garnishees' affairs. The garnishees are forced to open their books and reveal how they are conducting their overseas ventures, what deals they were able to strike with the foreign sovereign, how they pay their obligations, and how they structure their relationships with corporate affiliates.

Given that these garnishees have no connection to the underlying debt, these burdens and this intrusion are troubling. But the harm inflicted on the United States companies is particularly hard to fathom because it arrives after the fact through a court decision that adopts a novel and unusual definition of the controlling statutory language. Prior to the Fifth Circuit's opinion below, an American company would not have expected that by merely entering into a development agreement with a foreign nation, it would be condemned to protracted garnishment litigation in the United States based on debts to which the company was a stranger. Yet now, after countless companies have entered into such agreements, they face the specter of potentially limitless garnishment litigation over debts to which they were not a party.

Some of the statistical data involving foreign debt provides a stark indication of the flood of garnishment litigation that could be released by the lower court's holding. The International Monetary Fund and World Bank estimates that it will cost $54.5 billion to assist 37 Heavily Indebted Poor Countries to reach program goals for debt reduction.[2] If the cost simply to reduce the debt to manageable levels is $54.5 billion, the underlying debts that could form the basis for garnishment actions are massive.

The potential for garnishment chaos is further inflamed by the incentive that the decision below creates for

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[2] International Monetary Fund And International Dev't Association, Heavily Indebted Poor Countries (HIPC) Initiative: Status of Implementation, IMF & World Bank (Aug. 20, 2004) at 13, http://siteresources.worldbank.org/INTDEBTDEPT/PublicationsAndReports/20264190/HIPC-status-Of-Implem.pdf.

creditors to acquire foreign debts and race to American courthouses to execute on them. A debt that previously might have been the subject of global, internationally supported voluntary debt restructuring negotiations suddenly has the potential to be satisfied involuntarily if the creditor can find an American company who is obliged to the debtor sovereign and beats all other competing creditors to the courthouse door. These races to an American courthouse will result in the substantial consumption of American judicial resources in order to supervise the payment of debts arising entirely in other nations.

Moreover, under the opinion below, the potential burden of protracted garnishment litigation could discourage American companies from pursuing ventures with foreign nations, particularly when added to the high economic and political risks that otherwise apply to such projects in all events. In short, although development of oil and other natural resources overseas is vital to the United States' economic and security interests, the holding below creates incentives for both foreign sovereigns and American companies alike to decline to pursue such opportunities with the other.

The holding below also threatens this country's foreign policy in at least two other ways. The United States has been an active participant in the efforts of the international community to help heavily indebted nations reduce their debts to manageable levels. Our courts should not be the vehicle for a creditor end run on this important foreign policy.

Moreover, by giving other nations an incentive to discriminate against American companies in providing access to mineral resources, the holding below could

trigger retaliatory discriminatory measures by this country against either the discriminating foreign sovereigns or the countries who receive preferences. The United States policy of encouraging free trade and cooperative ventures with other nations would thereby be undermined.

In short, the holding below may harm the competitiveness of American companies, impair United States foreign policy and hinder invaluable development projects worldwide in myriad other ways.

B. Given The Substantial Adverse Impacts Of The Fifth Circuit's Holding, The Fact That Its Holding Conflicts With This Court's Precedents And Decisions Of Other Circuits, And The Lack Of Any Precedent To Support The Fifth Circuit's Analysis, The Court Should Grant The Petition For Writ Of Certiorari

Given the substantial adverse impacts of an erroneous holding, it is essential that our courts adopt the correct interpretation of the FSIA's situs requirement. Since petitioners have demonstrated the errors in the Fifth Circuit's analysis, ChevronTexaco only underscores three key points here.

First, the Fifth Circuit's holding conflicts with that of other circuits that have determined the situs of intangible property in cases involving a foreign state or implicating international relations. *See Braka*, 762 F.2d at 224-25 (2d Cir. 1985); *F. & H.R. Faman-Farmaian Consulting Eng'rs Firm*, 882 F.2d at 286-87 (7th Cir. 1989); *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334, 1338 (9th Cir. 1985).

Second, the lower's courts holding also deviates from this Court's precedent in multiple ways. *See* Petition at 12-19.

Third, the Fifth Circuit relied on a case that determined the situs of a debt obligation purely for purposes of a state law question and that did not involve the interests of a foreign sovereign or implicate international relations. App. 19a, *citing Harris v. Balk*, 198 U.S. 215 (1905). That case has no application here, where federal and international interests plainly are at stake.

At a minimum, these and the other points that petitioners have made provide substantial grounds to question the Fifth Circuit's holding on a question that is of the utmost importance. To settle that important question, the Court should grant the petition for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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